

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

MARC VEASEY, ET AL.,)	CASE NO: 2:13-CV-00193
)	
Plaintiffs,)	CIVIL
)	
vs.)	Corpus Christi, Texas
)	
RICK PERRY, ET AL.,)	Tuesday, April 1, 2014
)	
Defendants.)	(10:27 a.m. to 12:04 p.m.)

MISCELLANEOUS HEARING

BEFORE THE HONORABLE NELVA GONZALES RAMOS,
UNITED STATES DISTRICT JUDGE

Appearances:	See Next Page
Court Recorder:	Arlene Benavidez
Clerk:	Brandy Cortez
Transcriber:	Exceptional Reporting Services, Inc. P.O. Box 18668 Corpus Christi, TX 78480-8668 361 949-2988

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1 **Corpus Christi, Texas; Tuesday, April 1, 2014; 10:27 a.m.**

2 **(Call to Order)**

3 **MS. WESTFALL:** Yes, this is Elizabeth Westfall and
4 others for the United States. We will be listening and not
5 participating by phone.

6 **THE CLERK:** Thank you, Ms. Westfall.

7 **MR. HEBERT:** This is Gerry Hebert and Emma Simpson,
8 co-counsel for the Veasey-LULAC Plaintiffs.

9 **THE CLERK:** Thank you, Mr. Hebert.

10 **MR. KEISTER:** This is Ronnie Keister with the Texas
11 Attorney General's Office. And there are some others on the
12 line, but we'll just be listening, not participating.

13 **THE CLERK:** Thank you, Mr. Keister.

14 Do I have any other parties present?

15 **MR. POSNER:** Yes, this is Mark Posner with the
16 Lawyers' Committee representing the NAACP involved, and I also
17 will be listening in and not participating.

18 **THE CLERK:** What was your name, sir?

19 **MR. POSNER:** It's Mark Posner, P, as in "Paul,"
20 O-S-N-E-R.

21 **THE CLERK:** Thank you. Is there anybody else present
22 on the phone?

23 **MR. DUNBAR:** Yes, this is Kelly Dunbar and others
24 listening in with the Texas League of Young Voters Education
25 Fund.

1 **THE CLERK:** Okay. Thank you. Is there anybody else
2 present on the line who has not announced?

3 **MS. KORGAONKAR:** This is Natasha Korgaonkar from the
4 NAACP Legal Defense Fund. I'm also going to be listening in.

5 **THE CLERK:** We can barely hear you.

6 **MS. KORGAONKAR:** I'm sorry. Natasha Korgaonkar from
7 the NAACP Legal Defense fund on behalf of the Texas League.

8 I'll just be listening in.

9 **THE CLERK:** Okay. Thank you. And, counsel, anybody
10 that's on the line that's going to speak, if you could just
11 announce your name before you speak so Ms. Benavidez can get a
12 clear record.

13 And I just want to confirm everybody is on a
14 landline, and not on a cell phone, and not on speaker phone; is
15 that correct?

16 **MR. SPEAKER:** Correct.

17 **THE CLERK:** The Judge is on the bench and she'll call
18 the case, and there's several parties appearing in the
19 courtroom.

20 **THE COURT:** All right. Good morning. Court calls
21 Cause Number 2:13-193, Veasey, et al., versus Perry, et al.

22 We've heard from the people appearing by phone. If
23 the Plaintiffs want to announce for the record, those present
24 in the courtroom?

25 **MR. FREEMAN:** Thank you, your Honor. Daniel Freeman

1 on behalf of the United States of America. And with me are my
2 colleagues, Richard Dellheim and Avner Shapiro, as well as
3 Paxton Warner from the U.S. Attorney's Office.

4 **THE COURT:** Okay.

5 **MR. HAYGOOD:** Good morning, your Honor.

6 **THE COURT:** Good morning.

7 **MR. HAYGOOD:** Ryan Haygood with the Texas League of
8 Young Voters. I'm joined by my colleague, Sonya Lebsack.

9 **MR. ROSENBERG:** Good morning, your Honor.

10 **THE COURT:** Good morning.

11 **MR. ROSENBERG:** Ezra Rosenberg from Dechert,
12 representing Texas NAACP and the Mexican American Legislative
13 Caucus.

14 **MR. DUNN:** Good morning, your Honor.

15 **THE COURT:** Good morning.

16 **MR. DUNN:** Chad Dunn and Neil Baron on behalf of the
17 Veasey-LULAC Plaintiffs.

18 **MR. RIOS:** Good morning, your Honor.

19 **THE COURT:** Good morning.

20 **MR. RIOS:** Rolando Rios on behalf of the Texas
21 Association of Hispanic Judges and Commissioners and Hidalgo
22 County.

23 **THE COURT:** Okay.

24 **MR. GARZA:** Jose Garza, representing the Ortiz
25 Plaintiffs, with Marinda Van Dalen.

1 **MR. SCOTT:** John Scott for the State of Texas, your
2 Honor.

3 **MR. CLAY:** Reed Clay also from the State of Texas.

4 **MR. WHITLEY:** David Whitley also with the State of
5 Texas.

6 **MR. D'ANDREA:** Good morning, your Honor. My name is
7 Arthur D'Andrea. I have a Pro Hac Vice Motion pending. I'm
8 here to represent the legislators.

9 **THE COURT:** Okay. Brandy, do we have that?

10 **THE CLERK:** Yes, your Honor.

11 **THE COURT:** If it's not an issue, I can go ahead and
12 get that signed.

13 All right. Anyone else announcing for the record?

14 (**No audible response**)

15 We're going to pull that real quick, so we can
16 address the pro hac vice.

17 But just moving ahead, there were a couple of
18 unopposed motions filed yesterday, so the Court will go ahead
19 and grant those motions.

20 It was DE 217, the Unopposed Motion to File an Amicus
21 Brief, is granted.

22 And then DE 218, which was the Unopposed Motion by
23 the Defendants to file a Surreply to the Motion to Modify the
24 Scheduling Order, that's granted.

25 So we're here again on the Plaintiffs' Motion to

1 Compel the Production of the Legislative Documents. We've
2 previously had a hearing on that. There's been some further
3 briefing provided to the Court, and I'll let you argue
4 generally in a little bit.

5 But I do want to address a couple of questions,
6 issues, up front.

7 And, first, I want to address whether the documents
8 we're discussing here that are in the possession of either the
9 Defendant, State of Texas, or the Office of the Attorney
10 General, whose -- where are they?

11 If they're in the possession of the State of Texas,
12 that's a party subject to Rule 34. I believe they have
13 possession.

14 If, you know, it's the Office of the Attorney
15 General, then maybe they're a subpoena -- they're a Rule 45
16 subpoena to the Office of the Attorney General.

17 So a little argument on that point, and then I'll let
18 you respond. Okay?

19 **MR. FREEMAN:** Certainly, your Honor.

20 Texas conceded in its initial disclosures that it had
21 possession, custody, or control over the set of documents that
22 the State of Texas collected in the Section 5 litigation in
23 response to Requests for Production that were issued by the
24 United States Attorney General to the State of Texas.

25 Counsel for the State of Texas signed those initial

1 disclosures and the United States relied upon those initial
2 disclosures for months, and including in issuing -- or, excuse
3 me -- in moving to compel the production of those documents.

4 Whether or not the State of Texas, as a legal entity,
5 or the Office of the Attorney General has physical possession
6 of those documents --

7 **MR. HENRICHSON:** This is Preston Henrichson with
8 Hidalgo County.

9 **THE COURT:** All right. Welcome.

10 **MR. FREEMAN:** -- the United States believes is
11 essentially irrelevant.

12 The State of Texas, in The United States v. American
13 Express, argued specifically that documents -- excuse me --
14 that the Office of the Texas Attorney General is subject to
15 party discovery in matters in which the Texas Attorney General
16 litigates on behalf of the State.

17 Now, they made that argument in order to argue that
18 the Office of the Governor was not subject to discovery.

19 Now, here, where there are documents that may be in
20 the physical possession of the Office of the Texas Attorney
21 General, they're arguing that the Office of the Texas Attorney
22 General is not subject to discovery.

23 Essentially, they have drawn a null set for what
24 constitutes the State of Texas --

25 **THE COURT:** Well, I --

1 **MR. FREEMAN:** -- for purposes of --

2 **THE COURT:** And, actually, I think --

3 **MR. FREEMAN:** -- discovery.

4 **THE COURT:** -- either way, if I order them produced,
5 depending on what we do here a little bit later this morning --
6 I mean, it's either the party has possession subject to Rule
7 34; or the OAG is separate from the parties here, and then it's
8 just a Rule 45 subpoena to get documents from the OAG. And
9 then they can raise whatever they want to raise.

10 But, I mean, I -- it's an extra step procedurally, et
11 cetera, but I'm just trying to clear up --

12 **MR. FREEMAN:** I --

13 **THE COURT:** -- who has possession --

14 **MR. FREEMAN:** Your Honor --

15 **THE COURT:** -- and what do we need to do.

16 **MR. FREEMAN:** In Hickman v. Taylor, the United -- or,
17 excuse me -- the Supreme Court said that where there are
18 documents in the possession of a party's attorney and the
19 matter has been briefed completely, regardless of whether it is
20 a procedural -- whether it's procedurally appropriate under
21 Rule 34 or Rule 45, if the documents are in the possession of a
22 party's attorney, the Court could just move forward under Rule
23 34.

24 **THE COURT:** Okay.

25 **MR. FREEMAN:** Now, whether or not the legal

1 definition of the State of Texas incorporates the Office of the
2 Attorney General when it litigates on behalf of the State,
3 which the United States believes it does, or whether the Office
4 of the Attorney General is separate from the legal entity of
5 the State of Texas, which itself has no documents, is
6 essentially irrelevant.

7 **THE COURT:** All right.

8 **MR. FREEMAN:** Because the documents should be subject
9 to production under the pending Motion.

10 Thank you.

11 **THE COURT:** Anyone else from --

12 **MR. DUNN:** Your --

13 **THE COURT:** -- the Plaintiffs?

14 **MR. DUNN:** Before the State responds, can I suggest
15 that comments be made at the podium? After the last hearing, a
16 number of people on the phone said they couldn't hear what was
17 happening when people didn't speak at the podium.

18 **THE COURT:** They're welcome --

19 **MR. DUNN:** That's all I wanted to --

20 **THE COURT:** -- to join us in person if they would
21 like next time.

22 **MR. DUNN:** Yeah, that's --

23 **THE COURT:** But that's fine. If you all want to make
24 your comments from the podium to facilitate and ease the
25 process for those on the phone, that's fine with the Court.

1 **MR. ROSENBERG:** Good morning, your Honor. Ezra
2 Rosenberg.

3 I'll just add to what Mr. Freeman has stated, that
4 not only in their initial disclosures did Texas assert that it
5 had custody and possession of these documents, but in the joint
6 report that was issued by this Court after the Rule 26
7 Conference, Texas itself -- it has stated -- Texas has
8 indicated that it will assert several privileges, and goes on
9 to discuss the legislative privilege.

10 So it has always been the position, and this was a
11 position that went back to the Section 5 case, when Texas was a
12 party, and Texas produced these documents, or withheld
13 documents on privilege grounds, but privileges it said it was
14 asserting, and it is these documents -- those documents that
15 are listed in the same privilege log that was in the Section 5
16 case that is now in this case, which has always been Texas's
17 privilege log that is in issue.

18 And I -- there's absolutely no question that it has
19 possession, custody, and control.

20 **THE COURT:** All right. Any other Plaintiffs wish to
21 address that issue?

22 Okay. Mr. -- who's going to address it?

23 **MR. CLAY:** I will.

24 **THE COURT:** Mr. Clay.

25 **MR. CLAY:** Good morning, your Honor.

1 **THE COURT:** Good morning.

2 **MR. CLAY:** The -- with respect to the legislative
3 documents that are in the custody and control of the Attorney
4 General's Office, those documents are -- as I just said,
5 they're in the custody and control of our office and not the
6 State, writ large.

7 And we have cited several cases in our briefing, with
8 no rebuttal cases cited on the other side, that make clear that
9 simply suing the State of Texas does not bring other -- for
10 purposes of aggregating discovery, does not bring other
11 independent executive agencies unless they are also named.

12 As I just said, those cases have gone completely
13 unrebutted by the other side, and those cases make very clear
14 -- and are often made use of in similar circumstances by the
15 Department of Justice to make the argument that documents
16 within the custody and control of one independent executive
17 agency who is not a party does not mean that, just because
18 you've sued the state, that those documents are in the custody
19 or control of the Defendants.

20 The case that Mr. Freeman just brought up to you
21 assumes that party status when it says that documents in the
22 custody or control of the attorney are subject to Rule 34.

23 The problem here is the client here is the
24 legislators, and they are not parties in this case. And so as
25 attorney to the legislators, they're not subject to a Rule 34

1 Request for Production.

2 **THE COURT:** But didn't you get these documents in the
3 D.C. case to defend and to participate in that case on behalf
4 of the State of Texas?

5 **MR. CLAY:** Yes, but we got it in order -- we got it
6 to defend the legislative privilege in that case, where
7 legislators were also not parties.

8 In that case, it was the State of Texas acting to
9 defend the -- to seek preclearance of SB 14, and the
10 legislators were not a party in that case either, but we
11 represent them in their capacity of asserting a legislative
12 privilege in that case, and that's why we had the documents.

13 **THE COURT:** Okay. Is that all?

14 **MR. CLAY:** Yes.

15 **THE COURT:** Do you want to --

16 **MR. FREEMAN:** Your Honor --

17 **THE COURT:** You want to approach the podium there?

18 **MR. FREEMAN:** Yes. Your Honor, if I just might
19 quickly correct the record?

20 Those documents were gathered in response to Requests
21 for Production that were issued by the United States Attorney
22 General to the State of Texas, the legal entity of the State of
23 Texas, which was the Plaintiff in Texas v. Holder. Those
24 documents were gathered by the State of Texas and have
25 continued to be held by the State of Texas. Now, they were not

1 produced, but they were placed on a privilege log by the State
2 of Texas.

3 And the client on the -- on whose behalf the Office
4 of the Attorney General gathered those documents was the State
5 of Texas, which received the Request for Production.

6 Now, the Office of the Attorney General would like to
7 claim that it has separate clients here, but the fact remains
8 that there's only one client at issue with respect to these
9 documents.

10 Thank you.

11 **THE COURT:** Okay. The Court finds that the State of
12 Texas here, the party here, has possession of these documents
13 that are subject to the Rule, Rule 34. And that's how we'll
14 proceed.

15 All right. We're going to go on, then, to the
16 substance of the legislative privilege, and I guess basically
17 with that ruling, then, regarding documents in possession of
18 the State of Texas, or the Defendant here, the Defendants are
19 not required to serve the individual legislators with subpoenas
20 regarding those documents.

21 Now, I do think anything outside of that -- this
22 privilege is personal and the Plaintiffs are going to have to
23 serve subpoenas on the individual legislators for anything
24 outside of what the parties here possess.

25 **MR. FREEMAN:** Thank you, your Honor.

1 There's one separate category of documents that the
2 United States has additionally asserted are in the possession,
3 custody, or control of the State of Texas, and those are the
4 documents that are in the -- that are contained on Texas
5 Legislative Council servers or -- e-mail servers or document
6 servers.

7 The State of Texas, specifically with regard to those
8 documents, the State of Texas did not claim in their Opposition
9 to the pending Motion, or in their Surreply, that the Texas
10 Legislative Council was not a part of the State. It only made
11 that claim in their Brief on the subpoena issue.

12 And just a month --

13 **THE COURT:** Wait, I thought that was -- wasn't that
14 an issue before, or no? It's become an issue since we've had
15 the hearing as to whether TLC was --

16 **MR. CLAY:** No, no, no. We've always claimed that the
17 legislative branch, which includes the Legislative Council,
18 along with the individual legislators, are not parties.

19 **MR. FREEMAN:** Your Honor --

20 **THE COURT:** Uh-huh.

21 **MR. FREEMAN:** -- I would ask the Defendants to then
22 specifically point out where in either of those Briefs they
23 asserted that the Texas Legislative Council was not -- that
24 documents held by the Texas Legislative Council were not in the
25 possession, custody, or control of the State.

1 Defendants have repeatedly asserted that legislators
2 are not parties and need to be subpoenaed. What they didn't
3 answer in their Briefs until this last round of briefing was
4 the actual legal question under Rule 34, which is what
5 documents are in the possession, custody, or control of the
6 State of Texas.

7 Now, regardless of when they brought up this issue,
8 the fact remains that the Texas Legislative Council is within
9 the custody -- or possession, custody, or control of the State.
10 And -- because a mere month ago, the State had an employee of
11 the Texas Legislative Council sign Responses to Interrogatories
12 on behalf of the State of Texas in *Perez v. Perry*, the ongoing
13 redistricting litigation in the Western District of Texas.
14 This established under Rule 33(b)(1)(B) that the Texas
15 Legislative Council is, quote, "an officer or agent," close
16 quote, of the State of Texas.

17 And this --

18 **THE COURT:** That's the way they signed it?

19 **MR. FREEMAN:** They signed it, and I'm happy to
20 provide the Court with a copy of --

21 **THE COURT:** No, is that the way they signed it?

22 **MR. FREEMAN:** That's the text of the Rule.

23 **THE COURT:** Okay.

24 **MR. FREEMAN:** And I have a copy of that signature
25 page here, if the Court would like to have it.

1 And possession, custody, or control of information
2 known to a state agency can't be limited to evidence that the
3 State believes benefits its defense. And that is essentially
4 the game that the State is trying to play here.

5 And so the United States would continue to assert
6 that this Court should extend its ruling regarding the
7 documents that were listed in the State's initial disclosures
8 to those documents that are in the physical possession of the
9 Texas Legislative Council through its e-mail servers.

10 Thank you, your Honor.

11 **MR. CLAY:** Your Honor, we've maintained from the
12 beginning of this case that any part of the legislative branch
13 is not a party to this lawsuit, and that Rule 45 subpoenas
14 would be necessary in order to gain these documents.

15 What the other side would have you believe runs in
16 contravention to all of the case law that we've cited, which
17 talks about both legislators and independent state agencies who
18 are not sued are not to be aggregated for discovery purpose.

19 There's an easy solution to this. The solution has
20 been known since at least November; that a Rule 45 Subpoena is
21 the route to go for discovery from either legislators or the
22 Legislative Council.

23 **THE COURT:** Okay. But do you have documents in your
24 possession that are documents of the TLC?

25 **MR. CLAY:** To the extent I guess --

1 **THE COURT:** Because, again, we're kind of separating
2 this issue. If the Court says, yes, they're a separate entity,
3 a Rule 45 subpoena goes to them, there's still the issue of if
4 you have documents in your possession.

5 **MR. CLAY:** I don't know the --

6 **THE COURT:** Right?

7 **MR. CLAY:** I don't know the answer to that. It -- to
8 the extent we do, it would have been produced in the same
9 documents along with the Legislature's that we gathered in the
10 *Texas versus Holder* case.

11 **THE COURT:** Okay. And the ruling by the Court would
12 apply the same way to the extent you have documents in your
13 possession regarding --

14 **MR. CLAY:** Yeah, that's --

15 **THE COURT:** -- this entity.

16 **MR. CLAY:** That's how I understood your hearing, too.

17 **THE COURT:** Okay.

18 **MR. CLAY:** What I thought we were discussing was
19 additional documents that they're seeking from the TLC, which I
20 would -- I would -- I understood your previous ruling to mean
21 that they would need subpoenas for that information.

22 **MR. FREEMAN:** I -- Mr. Clay is correct, your Honor.
23 The United States is referring to documents not in the
24 possession of the Office of the Attorney General, but in the
25 possession of the Texas Legislative Council, which is an

1 officer or agent of the Defendant, State of Texas, and thus
2 within its --

3 **THE COURT:** Is it --

4 **MR. FREEMAN:** -- practical control --

5 **THE COURT:** -- really an officer --

6 **MR. FREEMAN:** Well --

7 **THE COURT:** -- of the State of Texas?

8 **MR. FREEMAN:** They -- the State of Texas has
9 certainly asserted that it has --

10 **THE COURT:** Is it?

11 **MR. FREEMAN:** Or that it is.

12 **THE COURT:** What does the Defense have to say about
13 that? You all want to stand at the podium so -- you all can --

14 **MR. CLAY:** Sure.

15 **THE COURT:** -- both stand up here. What's the
16 State's position on that assertion regarding --

17 **MR. CLAY:** Whether the --

18 **THE COURT:** -- the TLC?

19 **MR. CLAY:** Whether the entire Council an officer --

20 **THE COURT:** He's saying --

21 **MR. CLAY:** -- of the State?

22 **THE COURT:** -- there was some --

23 **MR. CLAY:** Well, the Council --

24 **THE COURT:** The TLC --

25 **MR. CLAY:** -- is made up of individual legislators.

1 And, then, of course, there's a body of staff that work for
2 them. But it's actually made up of various members of the
3 legislative branch.

4 **THE COURT:** So --

5 **MR. CLAY:** And so that goes to this -- the whole
6 argument we've been making all along, which is it is
7 independent of suing the State --

8 **THE COURT:** Okay. But he's trying to make it, or the
9 TLC, an officer of the State of Texas.

10 **MR. CLAY:** I think that's wrong. I mean, I think --

11 **THE COURT:** Well, I know. But --

12 **MR. CLAY:** -- that what it --

13 **THE COURT:** -- why don't you respond to his issue?
14 The reason he's bringing that up is some signature or some --
15 something that was signed in another lawsuit that indicates
16 that that's what that entity serves as.

17 **MR. CLAY:** Well, I think what it is, is a committee
18 of individual legislator --

19 **THE COURT:** You want to respond to what --

20 **MR. CLAY:** -- legislative figures --

21 **THE COURT:** -- his sheet there?

22 **MR. CLAY:** Yeah. Sure, I'm happy to look at it. I
23 don't know -- I probably wasn't a member of this.

24 **MR. FREEMAN:** Your Honor, to be clear, it's just a
25 simple signature page following a set of Interrogatory

1 Responses, and it's just that the Rule requires that an
2 individual who answers and signs on behalf of a government body
3 be an officer or agent of that body.

4 And, essentially --

5 **MR. CLAY:** Yeah, yeah. Yes, I mean, Clare Dyer, who
6 signed this, is an agent of the Texas Legislative Council.
7 That doesn't mean that they're an officer of the State.

8 **MR. FREEMAN:** Your Honor, the Rule states --

9 **MR. CLAY:** What it means is they're a representative
10 of the various -- of a Council that's made up of various
11 legislative members.

12 **MR. FREEMAN:** Your Honor, the Interrogatories were
13 served on the State of Texas as a whole, and the State of Texas
14 determined that the Texas Legislative Council was competent to
15 sign Interrogatories on behalf of the State of Texas.

16 **THE COURT:** I don't find that. I think they're a
17 separate entity.

18 However, to the extent -- the same rulings I said
19 earlier. To the extent that Defendants here have documents in
20 their possession that are documents of the TLC, they'll have to
21 be subject to the Court's ruling, Rule 34.

22 The Court finds they're in possession of those
23 documents for the purposes of Rule 34. Okay.

24 Is there -- I'm getting ready to move to the meat of
25 the privilege, so anything else before we go there?

1 **(No audible response)**

2 And I understand -- we're going to go ahead and
3 discuss the privilege here. I understand the Defendants here
4 and the attorneys here cannot raise that privilege for the
5 legislators, but I think, for purposes of moving this case
6 along, that we need to go ahead and flesh all that out, how
7 that's going to apply in this case and what's going to happen.

8 Now, I know at the last hearing I said this Court
9 finds privilege applies, it's qualified subject to a balancing
10 test, et cetera. But in the meantime, we were going to -- I
11 believe the State of Texas was going to reach out to the
12 individual legislators to see who was waiving, or what we were
13 doing, or what their position was on that issue.

14 **MR. CLAY:** And, Judge, I could not have advertised
15 for free pets and received as many phone calls over the last
16 two weeks.

17 We had -- the total numbers, I can give them to the
18 Court. I have added them up beforehand today.

19 A hundred and eighty-nine have asserted, 37 have
20 waived, 20 were nonresponders; but, in fairness, at least one
21 of those on that list, Representative Anna Mowery, it's my
22 understanding is non compos mentis and unable -- and is in a
23 facility in Fort Worth.

24 There are also four that are confirmed deceased on
25 the list provided by the Department of Justice.

1 So that is -- we filed that document with the Court
2 yesterday.

3 **THE COURT:** Okay.

4 **MR. FREEMAN:** Your Honor, if I could speak for just
5 one moment before we proceed to this, just on the issue of
6 subpoenas thus far before we start discussing who may need to
7 be subpoenaed?

8 As the United States outlined in its Reply Brief
9 concerning Plaintiffs' Joint Motion to Enter an Amended
10 Scheduling Order, Defendants have entered a cycle of admissions
11 and retractions that are essentially an exercise in
12 gamesmanship.

13 And last Friday the Defendants asserted that the
14 United States had served subpoenas improperly by serving them
15 on counsel who represent Defendants and the subpoenaed
16 legislators as individuals -- notwithstanding Defendants'
17 agreement in open court to accept those subpoenas.

18 Defendants stated that they would not accept the
19 subpoenas on behalf of the legislators unless the United States
20 withdrew the pending Motion to Compel.

21 Defendants also newly claimed that legislators'
22 e-mails and documents on the TLC servers were outside of the
23 individual legislator's control.

24 This degree of gamesmanship has put both the orderly
25 discovery process and, ultimately, the schedule at issue.

1 And my colleague, Richard Dellheim, will be speaking
2 on the schedule. I will not be.

3 **THE COURT:** And I'm not --

4 **MR. FREEMAN:** But to the extent --

5 **THE COURT:** -- there yet.

6 **MR. FREEMAN:** To the extent that this Court does
7 order that discovery of legislative documents proceed by
8 subpoenas, which no Court has ever before ordered the United
9 States to do in a Voting Rights Act case, to the knowledge of
10 the Department of Justice, I would ask that the --

11 **THE COURT:** They're not parties here. Just the way
12 your Congress is not a party to this case, the individual
13 legislators are not parties to this case.

14 **MR. FREEMAN:** Thank you, your Honor.

15 **THE COURT:** And I am -- I've -- I said that refers to
16 documents that are not in the possession of the Defendants.

17 **MR. FREEMAN:** Thank you, your Honor. And I
18 understand. But I just ask that the Court please set some
19 contours and boundaries to what will happen in that subpoena
20 process, so that the remaining discovery can happen in an
21 orderly manner.

22 Thank you.

23 **THE COURT:** Okay.

24 **MR. DUNN:** Your Honor, I would just like to address
25 this list that the State has filed to make sure it's correct.

1 And, for the record, this is Chad Dunn for the
2 Veasey-LULAC Plaintiffs.

3 Mark Veasey is listed as a "did not respond." He's
4 obviously one of my clients in this case. He's now a member of
5 Congress, was in the State Legislature when Senate Bill 14 was
6 passed.

7 He was -- there was no inquiry made of Congressman
8 Veasey on legislative privilege, so I think that is inaccurate.
9 I want to make sure the Court is aware that Congressman Veasey
10 waives his legislative privilege on the Document Requests at
11 issue in this case.

12 **MR. SCOTT:** And I did fail to tell the Court, I did
13 not -- I purposely pulled the letter to Congressman Veasey,
14 because --

15 **THE COURT:** He was the right person --

16 **MR. SCOTT:** -- he is a party to the case, and I
17 thought that he's supposed to plead for himself.

18 And just to briefly address Mr. Freeman's point, the
19 State of Texas was caught in a position of having Defendant --
20 of Plaintiffs say that legislators were parties, in the last
21 hearing before this Court, because they were part of the State
22 of Texas, yet then they were attempting to serve Rule 45
23 subpoenas on us.

24 I said, "You can't have it both ways. Pick one.
25 They're either parties, at which point you don't need to serve

1 them with Rule 45 subpoenas, or we'll accept the Rule 45
2 subpoenas and pull back the issues that relate to those
3 subpoenas."

4 So just -- so that the record is completely clear on
5 the point Mr. Freeman brought up.

6 **THE COURT:** Okay. But if the Defense is saying
7 they're not parties, then it's done through a Rule 45, right?

8 **MR. SCOTT:** Well, absolutely. And we stand ready and
9 happy to accept those on behalf of those that have asked us to
10 accept them on their behalf.

11 **THE COURT:** Okay.

12 **MR. FREEMAN:** Your Honor, the issue is simply that
13 Texas has managed to burn weeks by not responding to the
14 subpoenas and asserting that they were improperly served, when
15 they would essentially say there is no way to get to the
16 legislators until we withdraw our Motion.

17 If it's Texas's position that they are not subject to
18 party --

19 **THE COURT:** Well, I'm not --

20 **MR. FREEMAN:** -- discovery --

21 **THE COURT:** -- hearing withdraw the Motion fully
22 regarding the subpoena on these legislators.

23 **MR. FREEMAN:** That was --

24 **THE COURT:** Yeah, I don't --

25 **MR. FREEMAN:** -- contained --

1 **THE COURT:** -- know. That's what I heard.

2 **MR. FREEMAN:** It's fine, your Honor. And that was
3 what was contained within a letter that they sent to us. But
4 I'm simply asking that the Court do -- I'm asking that the
5 Court do what it can to ensure an orderly process here. That's
6 all.

7 **MR. SCOTT:** Well, and I agree. And we got -- just to
8 clarify again -- the Rule 45 subpoenas, on March 14th, the
9 State of Texas received unannounced subpoenas on its
10 legislators from Ms. Westfall. They were served by e-mail to
11 me. They were undated. When we pointed this out a few days
12 later, they created backdated subpoenas that they then served
13 on us.

14 And then subsequent to that, they served the same set
15 the third time on the 29th, this past Saturday.

16 So I don't know about weeks burning, and I don't know
17 about gamesmanship, but the same set of subpoenas have now come
18 to us three different times.

19 **MR. FREEMAN:** Your Honor -- Your Honor, the United
20 States called three different attorneys for the Office of the
21 Texas Attorney General and none of them returned our phone
22 calls --

23 **THE COURT:** All right. We're on the same page,
24 right?

25 **MR. FREEMAN:** Yes. Thank you.

1 **THE COURT:** We know what we need to do regarding
2 that, individual legislators; and that, again, I'm stressing
3 does not include the documents already in the possession of the
4 Defendants.

5 So I'm going to move on. I think we need to discuss
6 the privilege. I understand, like I said, these Defendants
7 can't raise that privilege for the legislators, but we need to
8 flesh all this out and get this moving and this case on track
9 to be tried on September 1st.

10 So I had already said I know there's an issue and
11 there were some briefings saying there's no privilege, or --
12 but I believe I said at the last hearing the Court finds there
13 is a privilege, it is qualified, subject to the balancing
14 factors. I would use the balancing factors set forth in the
15 *Perez* case.

16 Obviously, very significant interests and concerns on
17 both sides of this case. I'd like to address the balancing
18 factors, and I don't need to address all of them with you,
19 because I probably touched on some of these at the last
20 hearing.

21 But regarding factor one, I don't think there's any
22 question that the evidence sought by the Plaintiffs here is
23 highly relevant to the issues here.

24 I will allow you to comment on that, either side, if
25 you would like, but I just -- I don't see how it's not

1 relevant, and highly relevant to this case.

2 Anything from the Plaintiff or the Defendants?

3 **MR. CLAY:** Yeah, I would just make one comment on the
4 relevance, and that is that the cases that we've cited in our
5 Briefs that do apply this balancing factor, it's hard to take a
6 categorical approach to the relevance of the various types of
7 evidence that they're looking for.

8 Certain types of evidence are considered to be more
9 relevant than others just because of the legal standard.

10 One of the cases I would point your Honor to is to
11 the Kay versus City of Rancho Palos Verdes, where it talks
12 about the various types of evidence that might be responsive to
13 the type of requests that are at issue here. And noting that
14 some types of evidence are more probative of the issues than
15 others, and then a --

16 **THE COURT:** More probative. But we're not saying --
17 it's relevant.

18 **MR. CLAY:** Oh, I don't think we're making some sort
19 of categorical relevance objection here. I think, in the
20 balancing test, some of the -- some of the types of information
21 that they're seeking is of, I would say, little relevance; and,
22 therefore, the balancing factors weigh in favor of not --

23 **THE COURT:** The --

24 **MR. CLAY:** -- intruding on the legislative decisions
25 of individual legislators.

1 **THE COURT:** So it depends on what the evidence is?

2 **MR. CLAY:** Yeah, I -- and, you know, Mr. Dunn, in a,
3 you know, somewhat novel filing called an "advisory" yesterday
4 made the -- made a -- alerted the Court to a new decision that
5 came out of the North Carolina voter ID case.

6 And it looks like what they're going to do there is
7 kind of do what I think I'm suggesting here, which is look at
8 the various types of evidence in order to really apply the
9 balancing test instead of this categorical approach of, well,
10 all this stuff is relevant, and so I'm going to apply it --
11 this balancing test just globally to the -- to legislative
12 evidence and rule it's either in or it's out.

13 And I think that's probably not the way to go. I
14 think it does -- it's not -- that way of looking at it is not
15 supported by the case law, and it doesn't look like that's what
16 our sister court -- or your sister court in North Carolina is
17 going to be doing.

18 So that's the only thing I would make on the
19 relevance thing is that some of it is more relevant than
20 others, and I think that is a -- is a big deal when you're
21 applying a balancing test.

22 So it's just something to keep in mind.

23 **THE COURT:** Okay.

24 **MR. FREEMAN:** Thank you, your Honor.

25 Just with regard to whether or not there can be

1 determinations made up front regarding the relative importance
2 of different legislative documents that are in the possession
3 of the State, the United States can't know until the State
4 provides something more than the privilege logs that we've
5 received what documents are going to be particularly relevant.

6 And the North Carolina Court has suggested that
7 parties come together and try to reach some kind of agreement
8 about a framework; and, simply put, we don't have the time to
9 do that kind of cooperative process here.

10 The documents here, in cases such as Irvin, were
11 simply turned over because of the very importance of the issues
12 -- and I believe in Baldus as well. And we would recommend and
13 request that this Court treat the documents the same in terms
14 of, for disclosures purposes.

15 And if the Court wishes to make an individualized
16 determination, that the State be ordered to produce all the
17 documents in its possession under the provisions of the Consent
18 Protective Order, and then an individualized determination
19 could be made with regard to specific documents when they're
20 presented at trial.

21 **MR. DUNN:** Chad Dunn on behalf of the Veasey-LULAC
22 Plaintiffs. I want to address the advisory that's been raised
23 that we filed yesterday. Counsel felt that we had a
24 responsibility to the Court to provide it Orders from other
25 Courts on similar subjects. That's why we did so. We stated

1 in the advisory we don't think it's particularly determinative.
2 I want to explain that now since it's been raised by the State
3 in support of its position. The situation in a North Carolina
4 case was essentially at the hearing this Court held prior, it
5 was trying to determine whether there was a privilege at all,
6 which this Court has already decided. And what the Magistrate
7 did in the North Carolina Court was order the parties, "Now
8 that you know there's going to be a qualified privilege, try to
9 sit down and negotiate over the documents." That's a new sort
10 of situation for that case. In this case --

11 **THE COURT:** But now new for you-all because you-all
12 have kind of operated under that already to a certain extent
13 but yes.

14 **MR. DUNN:** Exactly. Since the Texas -- Since the
15 D.C. case, we have been at loggerheads over what to do with
16 these documents. Further discussion isn't going to get us
17 anywhere.

18 **THE COURT:** Okay.

19 **MR. ROSENBERG:** Very briefly. Ezra Rosenberg. I
20 just wanted to urge the Court to consider the procedure that
21 Mr. Freeman suggested given the schedule constraints here,
22 given the number of documents that are an issue and, obviously,
23 this Court cannot possibly look at all the documents to decide
24 privilege on a document by document basis but the parties can
25 bear that burden and if and when -- and until such time as any

1 document is offered into evidence, it should be subject to the
2 highly confidential designation of the Protective Order.

3 That's what the Court in Favers versus Quomble (phonetic) did.
4 Other Courts have taken that attack. It preserves a certain of
5 the interest behind the privilege. At the same time, allowing
6 discovery to go ahead under a very constraint schedule and then
7 if and only if a party chooses to put a document into evidence,
8 the Court will then have to review the document in camera.

9 **THE COURT:** All right. Go ahead.

10 **MR. CLAY:** May I talk?

11 **THE COURT:** Yes.

12 **MR. CLAY:** Okay.

13 **THE COURT:** Just trying to get through the factors
14 here, but --

15 **MR. CLAY:** Two things. One of the reasons that the
16 North Carolina case was in a different posture is that the
17 parties in that case actually issued Rule 45 subpoenas back in
18 January to the individual legislators. The other point I would
19 make is, we are in a little bit different posture in this case
20 because we've already had one Court who has actually ruled on
21 this privilege issue and applied a very similar balancing test
22 based upon a very thorough review of the existing case law in
23 voting rights out of cases and the documents that that Court
24 determined that were not privileged were turned over and the
25 ones that -- are -- had not been given to the other side in

1 that case or in this case, were already determined to be
2 privileged based on a similar balancing test. With respect to
3 the Protective Order being some sort of safe harbor for
4 breaking privilege -- I mean, that's not necessary -- I mean,
5 the privilege is still broken by forcing legislators to cull
6 their documents and turn that over even to a small group of
7 attorneys who are litigating this -- a statute that they've
8 passed. So, the Protective Order is -- doesn't offer much
9 solace in terms of breaking the privilege.

10 **MR. FREEMAN:** Your Honor, if I may just correct the
11 record? The United States is a party to the North Carolina
12 litigation and the United States -- it is my understanding that
13 the United States moved to compel the production of documents
14 in that case and that other private Plaintiffs who did not sue
15 the State of North Carolina in its entirety issued subpoenas.
16 And, specifically, if the case that Mr. Clay is referring to is
17 Texas v. Holder, as the United States has mentioned before, the
18 *Texas v. Holder* Court considered concerns regarding Federalism
19 underlying Section 5 in making its analysis of privilege and
20 that simply does not apply here. Thank you.

21 **THE COURT:** All right. I'm moving to factor two
22 where I do -- I think there's some question there so I am going
23 to take some argument regarding these other sources of -- or
24 availability of other evidence. Does the government want to
25 proceed on that?

1 **MR. FREEMAN:** Thank you, your Honor. Essentially
2 debate in the Texas House and the Texas Senate concerning SB14
3 proceeded by talking points. So the publicly available debate
4 -- the information that legislators have made public and, thus,
5 have not asserted a privilege over, does not reveal anything
6 more than what they calculated in the context of being subject
7 to the Section 5 preclearance provisions would be a publicly
8 acceptable discussion of the intent of the law. More
9 critically, when minority legislators during the legislative
10 debate raised concerns regarding the effect of this law on
11 minority voters, raised concerns about the underlying intent of
12 the law. The Senate sponsor and House sponsor simply repeatedly
13 said that they were not advised as to what the effect of the
14 law would be on minority voters and refused to engage with
15 those concerns. Because of that stonewalling, these documents
16 -- the documents at issue are the only candid discussions that
17 currently exist. And so, the United States believes that those
18 documents are critical to understanding whether alongside other
19 purposes such as preventing voter fraud and any other
20 legitimate purposes, that the Texas legislature may have had,
21 alongside those purposes, whether there was an additional
22 purpose which was to abridge the right of minority voters to be
23 able to cast a ballot under this law.

24 **THE COURT:** All right. Mr. Clay, do you want to
25 respond on factor two? And then if anyone else wants to speak,

1 just let me know because I'm going to move.

2 **MR. CLAY:** I'm over here trying to remember all the
3 factors. I think this -- the point here actually relates to
4 the relevance point that I was making earlier. As Arlington
5 Heights, which is -- you know, kind of lays out the framework
6 for establishing a purpose case and a Voting Rights Act case,
7 makes very clear the most probative evidence of what the
8 legislature meant is not the individual deliberations or
9 individual actions of an individual legislature, but it's the
10 public record, the legislative history, the debates. And the
11 idea that -- I mean, they say it proceeded by talking points.
12 I'm not sure what that means, and I seriously doubt that that's
13 true because I don't know any Bill passes that goes that
14 smoothly. But even if it did, they're assuming that the
15 talking points here are somehow -- they assume that they're not
16 true or that they're not the real intent of the legislature.
17 And that's a very dangerous activity to get into here. The
18 main point is, the *Arlington Heights* and other cases make very
19 clear that what you're supposed to look at is what's publicly
20 available, the debates, the legislative history, what happened
21 in Committee, what happened on the floor, not what an
22 individual legislator did or said and -- you know, amongst each
23 other. The other point I would bring up is, the reason that
24 the Voting Right -- the Voting Rights Act not only allows for a
25 statute to be enjoined based on a discriminatory purpose, but

1 it also allows for -- Congress has gone further than the 14th
2 or 15th Amendment by allowing the election law to be enjoined
3 because of discriminatory impact. And that is only -- the
4 reason that they -- Congress put that into the statute was
5 because of rulings like City of Mobile that made it very clear
6 that in order to enjoin a statute on the 15th Amendment, you
7 had to prove a discriminatory purpose and that is necessarily a
8 hard task because you are required to look at the publicly
9 available information -- the legislative history and the
10 individual motivations -- hidden motivations of one single
11 actor simply cannot speak for what the legislature actually
12 did. They have no bearing on the purpose of the legislature as
13 a whole. And there's plenty of Supreme Court cases that hold
14 that.

15 **MR. FREEMAN:** Your Honor, if I can just speak to
16 *Arlington Heights* very quickly. The State has, in their
17 briefs, repeatedly inserted the work "public" into the language
18 of *Arlington Heights*. *Arlington Heights* contains no limitation
19 as to the Court -- whether this Court can look at both the
20 public statements of legislators and their private discussions
21 and numerous Courts have relied upon documents such as the
22 documents that are at issue in finding a discriminatory intent
23 underlying a voting related Bill. Now, the United States is
24 not saying that the Texas legislators did not maintain public
25 minded purposes as well. What is sufficient under the Voting

1 Rights Act is that there will be an additional purpose -- a
2 discriminatory purpose -- and that is the purpose that the
3 United States alleges exists and that is the purpose that the
4 United States should be allowed to examine evidence of,
5 including evidence that is contained in these documents. And
6 with regard to the talking points, the United States would
7 simply address -- direct the Court to the United States'
8 opening briefs in which the House and Senate sponsors repeated
9 identical language months apart with regard to this Bill and
10 the importance of voter identification and the prevalence of
11 voter fraud. Thank you.

12 **MR. ROSENBERG:** Your Honor, just one quick sentence.
13 The case, the Quanton (phonetic) case, 682 F.2d 1055 from the
14 4th Circuit where the Court recognized the common sense
15 proposition that officials "seldom, if ever, announced on the
16 record that they are pursuing a particular course of action
17 because of a desire to discriminate against a racial minority."

18 **THE COURT:** Okay. I don't need to hear anything on
19 factors three and four, which are the seriousness of the
20 litigation, the role of the government. I don't think there's
21 any question, this is a very serious issue case. The issue of
22 infringement on a person's ability to exercise her right to
23 vote and then, obviously, have the government on both sides
24 here. A substantial role the government is playing here, both
25 the Federal government in enforcing the voting right statutes

1 and then the role of Texas here defending this litigation here
2 that the challenge is being made because of motive and
3 considerations regarding Senate Bill 14. So I don't need to
4 hear anything on that. I think those are a given in this type
5 of case. Now, regarding factor five, which is the possibility
6 of future timidity by the government employees, that's
7 certainly a concern -- disclosure of confidential documents,
8 how that could affect the legislative process. Do you want to
9 comment on that for the Plaintiffs?

10 **MR. FREEMAN:** Thank you, your Honor. In the United
11 States v. Gilley, the Supreme Court addressed this exact
12 concern and said that in the absence of affirmative evidence,
13 it's simply speculative. Now, what we do have in Texas is
14 evidence that legislators and their documents have been put at
15 issue in redistricting litigation for decades. For decades,
16 legislators have taken the stand in redistricting litigation in
17 Texas and there has -- to my knowledge, and to -- with regard
18 to the evidence that the State has put forward, there has been
19 no detrimental effect on the legislative process in Texas.
20 Other Courts such as Baldus (phonetic), the Baldus case in
21 Wisconsin, have said that no public good suffers by the denial
22 of privilege when such important issues are at stake and we
23 would say that this Court, to the extent that it has concerns
24 regarding this issue, can address those concerns by either
25 placing these documents under seal or placing them under

1 paragraph -- I believe 2.1 of the Consent Protective Order.
2 Specifically with regard to the documents that are already in
3 the State's possession, there's no further burden on the
4 legislative process by producing those documents. Those
5 documents have already been produced. They've already been
6 logged. It's simply a matter of turning them over under seal
7 to a limited group of attorneys. And then if this Court deems
8 any particular document important enough, then the document
9 might be made public. With regard to further documents as the
10 United States recognizes that there is some greater burden, but
11 we don't believe that the burden of search will turn Texas
12 legislators into timid actors. To some extent, I think they
13 might take umbrage at the notion that they would suddenly
14 become timid. Thank you.

15 **MR. CLAY:** I think really the main point to be made
16 with respect to this factor, is you don't have to look much
17 further than the actors and the characters that are currently
18 before the Court in this case. We have counsel for the Texas
19 Democratic party who is representing a former member of the
20 Texas legislature who opposed this Bill suing the State of
21 Texas and now asking the Court to allow them to rummage around
22 into personal legislative documents of individual legislators.
23 That is a monumental ask of this Court. And the idea -- and I
24 also would take a little bit of issue with something
25 Mr. Freeman said earlier, that there are no Federalism concerns

1 here. The Constitution squarely places the power of regulating
2 elections to the States. And the Voting Rights Act already
3 infringes a little bit on that by allowing the United States to
4 bring an action to enjoin election laws that a -- merely
5 exhibit a discriminatory impact even if no discriminatory
6 purpose is actually proven. When that's the case, and then on
7 top of that, you're allowing the United States government to go
8 in and rummage around in the files of individual legislators of
9 the State, you've got -- again, the ask is monumental. And the
10 other side keeps bringing up the idea that legislators have
11 testified in other cases -- Voting Rights Act cases like
12 redistricting cases -- we've already mentioned to you before on
13 our previous hearing that redistricting litigation is somewhat
14 different because lines are drawn in a very particular way and
15 they're often done by coalitions of county members -- members
16 of different county delegations who draw their own maps and
17 then drop it into the statewide map. The other point I would
18 make is that if you'll notice a redistricting litigation that's
19 going on right now, they're asserting privilege and they're
20 asserting it for the very same reasons that we're asserting it
21 here, which is to allow this sort of wholesale -- you know,
22 deep dive discovery into what is essentially personal
23 legislative business is just unfounded and uncalled for. And
24 the idea that it's not going to have some sort of impact in the
25 future is -- I mean, the *Baldus* case notwithstanding, I mean, I

1 think that's just a categorical statement that it's not going
2 to have some sort of impact on legislatures in the future is
3 just simply not true.

4 **MR. FREEMAN:** Your Honor, if I may just respond to
5 the State of Texas, it's assertion regarding the
6 Constitutionality of the issues here? The intent claim that
7 the United States has brought is identical in the standard to a
8 14th and 15th Amendment claim. The 14th and 15th Amendment
9 bars the State of Texas from enacting any intent -- in acting
10 and applying any intentionally discriminatory law. The 14th
11 and 15th Amendment post-date any other Constitutional provision
12 on which the State of Texas is relying and, thus, there can be
13 no Constitutional impediment to the production of documents
14 here. With regard to the redistricting litigation, every
15 relevant actor has waived any assertion of privilege -- in that
16 litigation with regard to the 2011 claims, the only claims
17 where the United States is participating. And in this
18 litigation, the presence of private Plaintiffs cannot limit the
19 United States' ability to obtain the document discovery that is
20 at issue here. Thank you.

21 **MR. HAYGOOD:** Your Honor, we just would submit those
22 we have in the briefs. We think that the first four factors
23 that's set out in the Paridus (phonetic) case heavily outweigh
24 any possibility that there be future timidity on the part of
25 the legislatures. And to Mr. Clay's point, while it's true

1 that Texas is free to govern its own election, it's not free to
2 do so in a way that's discriminatory either in affect or in
3 intent as we argue the Plaintiff Intervenors and the Plaintiffs
4 argue in this case. And so, we would argue, your Honor, that
5 the first four factors here heavily outweigh any possible
6 future timidity on the part of the State legislature. And one
7 would hope that future timidity would inhibit the ability of
8 the legislatures to adopt discriminatory measures as they have
9 here with SB14.

10 **MR. DUNN:** Chad Dunn on behalf of the Veasey LULAC
11 Plaintiffs. On the issue of timidity of the process, since I
12 was addressed to the Court -- I'm the lawyer that was referred
13 to and not named that represents the Democratic party -- if the
14 Court is interested, I also represent some Republicans and
15 business clients and I do have the ability to comply with my
16 standard of professional conduct to exclude activities for one
17 client from another. But if so long as the State brings it up
18 as an issue, I think it ought to be pointed out that the State
19 has now for 18 months, at least, had in its possession the e-
20 mails from every Democratic member of the legislature that
21 relates to this issue and has had the advantage and benefit of
22 reviewing all of those, in addition to having possession of all
23 the Republican members of legislature. And so, to the extent
24 that there is any timidity, that bell has already been rung.
25 The Democrats are already well aware of the State's possession.

1 So, equalizing the issue here will have no further affect. But
2 I think the more prevalent and important argument is the one
3 that Mr. Freeman advanced which is in the Perez litigation.
4 These e-mails were handed over and, in fact, the State agreed
5 to hand them over. There's been a legislative session since
6 then and no evidence has been advanced of any timidity of this
7 legislature of doing its job or having adequate public
8 discourse on matters of public concern. So this issue weighs
9 in favor of disclosure.

10 **MR. CLAY:** Your Honor?

11 **THE COURT:** Okay.

12 **MR. CLAY:** And I'm not exactly sure. What I can
13 assure you is that we have not been digging through the e-mails
14 of the Democratic members of the legislature, plotting some
15 sort of nefarious defense of the voter I.D. Bill here. In
16 fact, I'm not even -- you know, beseech Mr. Dunn to tell me
17 which documents we have from Democrats because I'm actually --
18 Democratic members of the legislature because I'm actually not
19 sure which ones they are.

20 **THE COURT:** Well, if you let him see the documents,
21 he'll tell you.

22 **MR. CLAY:** Well, I can go back and check but my point
23 is, what they requested in the previous litigation was
24 documents from Republican legislatures. And that's what the
25 Office of the Attorney General has in our possession.

1 **MR. SPEAKER:** I can --

2 **THE COURT:** Okay. I don't need any more. So we've
3 discussed those factors and I think, as I said, one, three and
4 four definitely weighing in favor of the disclosure. There was
5 some argument on both sides regarding factor two, the
6 availability of other information. I think that, at least,
7 slightly weighs also in favor of disclosure. So really the
8 only factor that weighs -- and can be heavily against the
9 disclosure is the factor number five, how it may affect -- or
10 the timidity of the legislators in the future and how it may
11 affect the legislative process in the future. And the Court is
12 mindful and I understand -- you know, that is a concern and
13 issue. I do think overall the -- most of the factors kind of
14 weigh in heavily of disclosure, too -- I think at least weighs
15 somewhat in favor of disclosure but -- you know, this
16 information is sensitive. Although the factors weigh in favor
17 of the disclosure -- you know, I don't think the Court is
18 necessarily ready to fully pierce the privilege. And there's
19 enough here to take this different approach that these other
20 Courts have taken in these type of suits where the Court is
21 going to order Defendants to provide those documents to the
22 Plaintiffs under seal, marked highly confidential. Under --
23 there's Federal Rule of Evidence, I guess, 502(d). That
24 doesn't mean the privilege is waived by any disclosure. The
25 Court will address the privilege regarding individual documents

1 at the trial of this case if the Plaintiffs find that they want
2 to introduce any of that evidence. I don't recall right now
3 what the Protective Order says regarding highly confidential as
4 to who would have access to these documents under your current
5 -- or the Protective Order that's in affect. Does anyone know?

6 **(No response.)**

7 **THE COURT:** You can take some time to look at that if
8 you need to.

9 **MR. ROSENBERG:** No. Your Honor, I believe it's
10 counsel only, Court only, and court reporters but we can double
11 check that.

12 **MR. SPEAKER:** And experts.

13 **MR. ROSENBERG:** It would be subject to the very
14 highest tier of confidential.

15 **THE COURT:** So not the individual parties?

16 **MR. ROSENBERG:** No.

17 **THE COURT:** Just the lawyers?

18 **MR. ROSENBERG:** I am almost positive there is a
19 virtually counsel only provision.

20 **THE COURT:** Okay. We probably should double check
21 that.

22 **MR. SCOTT:** There is for attorney's eyes only --

23 **MR. ROSENBERG:** Yeah.

24 **MR. SCOTT:** -- if the Court were to order such a
25 thing and overrule, I guess, the attorney-client privilege that

1 we believe were obtained on those.

2 **THE COURT:** Well, I was going to move to that next.

3 **MR. SCOTT:** Okay.

4 **THE COURT:** Because I understand the legislative
5 privilege covered all of them. The attorney-client privilege
6 covers some of them, right?

7 **MR. SCOTT:** Well, all of the documents, your Honor,
8 that are in the Attorney General's Office, that are listed on
9 the privilege log which I understand that they're universal
10 documents we're discussing. All those documents were received
11 to the Attorney General's Office as by way of the legislators
12 and are in our possession under the attorney-client
13 relationship.

14 **THE COURT:** But that doesn't make them subject to the
15 attorney-client privilege. You have to satisfy the elements --
16 or for the attorney-client privilege. And just because they
17 were turned over by your client, doesn't mean they're
18 protected.

19 **MR. SCOTT:** Okay.

20 **THE COURT:** Right? That's the way I see it anyway.
21 But I'm assuming the Protective Order sets forth and under
22 highly confidential, it sounds like only the attorneys can
23 review these documents. You-all should probably double check
24 that before you leave today. So, anything else on the
25 legislative privilege issue?

1 **MR. FREEMAN:** Your Honor, may I just ask with regard
2 to use at depositions, would your Honor prefer that we place
3 documents before you before we use them at depositions or could
4 we simply place the depositions, themselves, under seal?

5 **THE COURT:** Any comment on that from the defense?

6 **MR. GARZA:** If I may, your Honor. In the
7 redistricting case, the depositions were placed under seal.

8 **THE COURT:** Right. But he's talking about these
9 documents that I've just addressed, whether -- if they're going
10 to be used in a deposition, I would think they should probably
11 be cleared from the Court. Obviously, we're getting -- you
12 know, it's going to depend on the volume as to how this Court
13 is able to handle that.

14 **MR. GARZA:** And within the context of the deposition,
15 when a document like that is going to be used, the court
16 reporter is instructed to put that portion of the deposition
17 and that document under seal.

18 **THE COURT:** Okay.

19 **MR. FREEMAN:** Your Honor, the United States would
20 support that procedure as well.

21 **MR. SCOTT:** And for the record, the State would not
22 be in agreement on that simply because the witness, then, would
23 have seen the document and while, I guess, the court reporter
24 of each of these witnesses under the same penalties of the
25 attorneys and our parties are under, I guess that would take

1 another step that we need to get to. But even then, we now
2 have expanded the universe of who is seeing documents.

3 **THE COURT:** Are you talking only about the witnesses
4 who may be producing these documents or authored these
5 documents?

6 **MR. FREEMAN:** That would be a category, certainly,
7 your Honor. And I would presume that most uses of these
8 documents would be in a deposition of their author or
9 recipient. If this Court wanted to --

10 **THE COURT:** Because beyond that, I can see where it
11 is a problem.

12 **MR. FREEMAN:** No. I understand, your Honor, and
13 that's why I raised it.

14 **THE COURT:** Okay.

15 **MR. FREEMAN:** If your Honor would want to, perhaps
16 craft a Rule where if a document were used at a deposition, it
17 could only be used by -- in the deposition of an author or
18 recipient of the document. Otherwise, the document --
19 otherwise, the Court would need to specifically clear use of
20 that document.

21 **THE COURT:** Anything else from the Plaintiffs on that
22 issue?

23 **MR. ROSENBERG:** That makes sense, your Honor. And
24 that deposition be under seal.

25 **THE COURT:** The Court will allow that.

1 **MR. SCOTT:** My concerns, I think, are all on the
2 record, your Honor.

3 **THE COURT:** Yeah. Okay. Anything else before we
4 move to the attorney-client privilege?

5 **(No response.)**

6 **THE COURT:** Then -- and I think Mr. Scott and I just
7 had a conversation about those documents on the attorney-client
8 privilege. This Court doesn't think they would all be covered.
9 I mean, the Defendant would have to show that they meet the
10 elements or what's required to establish an attorney-client
11 privilege.

12 **MR. FREEMAN:** Your Honor, there's a relatively small
13 universe of documents over which the Defendants have asserted
14 an attorney-client privilege on the privileged logs that they
15 incorporated by reference in their Initial Disclosures. The --
16 in many of those cases, the United States has not challenged
17 the assertion of an attorney-client privilege. Where the
18 United States does challenge the assertion of the attorney-
19 client privilege is where those communications were between
20 different legislative offices or where those communications
21 concerned matters that were clearly political such as polling
22 data. Those matters -- in the first case, the privilege should
23 be waived by the disclosure.

24 **THE COURT:** I mean, I agree with that. Do you
25 disagree with that?

1 **MR. SCOTT:** Well, I think we --

2 **THE COURT:** Between legislators, political issue --
3 public matters?

4 **MR. SCOTT:** I think I've done an incredibly poor job
5 of explaining the documents and why they're in the possession
6 of the State -- I mean, why they're in the possession of the
7 Attorney General's Office. That's a different issue than is I
8 think the one that Mr. Freeman has raised and I think the Court
9 was looking at, which is does the document itself contain
10 information relating to the attorney-client relationship.
11 That's -- we've marked that I think -- we've identified that --
12 I think Mr. Freeman is correct. We've identified those on a
13 privilege log those documents we believe that the document
14 itself would be a document that deals with the attorney-client
15 relationship. What I -- I believe I'm identifying to the Court
16 is the fact that the entire universe of those documents were
17 documents that the legislator was a client or sought to be a
18 client of the Attorney General's Office was a communication to
19 us that was confidential and made for the purpose of securing
20 legal services or a legal opinion or assisting -- assistance in
21 a legal proceeding, which was the *Texas v. Holder*. That's how
22 we got the stuff.

23 **THE COURT:** But just because you got all of them,
24 they're not all covered by the privilege. It has to meet all
25 of those little elements set out.

1 **MR. SCOTT:** Well, and that's --

2 **THE COURT:** Just because your client gives you a box
3 full of documents, they wouldn't all be privileged by attorney-
4 client or they wouldn't fit within that privilege.

5 **MR. SCOTT:** Were that how the transaction took place,
6 I agree a hundred percent. These documents were obtained by
7 the Attorney General's Office in a previous litigation where
8 they were given to us as a part of that litigation by potential
9 -- by our clients.

10 **THE COURT:** How does that make --

11 **MR. SCOTT:** They were in our offices only -- like the
12 documents that are in Deckerd's offices relating to a
13 pharmaceutical case against one of their clients. It worked --

14 **THE COURT:** So it wouldn't be protected.

15 **MR. SCOTT:** I'm sorry?

16 **THE COURT:** By this privilege, it would not be
17 covered by this privilege. The attorney-client privilege is
18 pretty specific as to what you have to establish to meet it.

19 **MR. SCOTT:** Yes and what I read a moment ago was from
20 the 5th Circuit. Since 1975, was -- were the factors relating
21 to documents that are, in fact, covered by the attorney-client
22 privilege.

23 **MR. FREEMAN:** Your Honor? If Mr. Scott's argument
24 were correct, Rule 34 would be a nullity. If I retained an
25 attorney and someone served a Rule 34 document request on me

1 and I gave a box of documents to my attorney and said, "Can you
2 look at these? Some of them are going to be responsive. Some
3 of them might be privileged. Let me know what's privileged."
4 If that transaction -- if the attorney-client privilege
5 attached because of that transaction, the attorney would say,
6 "Ah-hah, the entire box is covered by the attorney-client
7 privilege because you gave me the box so that I could review
8 them. I don't have to give anything." That's exactly what
9 he's trying to do with the entire set of documents that your
10 Honor just said were in the possession of the office of the
11 Texas Attorney General.

12 **THE COURT:** Well, it would be like "we have some bad
13 evidence in a box. Well, let me give it to my lawyer so I
14 don't have to turn it over."

15 **MR. FREEMAN:** And --

16 **THE COURT:** I mean, it kind of --

17 **MR. SCOTT:** And I would agree with the Court that the
18 procedural posture that we are in currently, by viewing the
19 State of Texas as having custody of these documents makes the
20 argument very difficult to conceptualize because it doesn't
21 necessarily work under that situation -- the procedural posture
22 we've got this in. But the correct posture that the documents
23 were obtained by us were from legislators. They continue to be
24 those individual legislators' documents. And I understand that
25 the Court has ruled otherwise.

1 **THE COURT:** And they can raise -- object and raise
2 their privilege. But I'm talking about how are we moving
3 along? I don't think I can sit on this any longer. You can't
4 -- we've established -- and I don't think there's any
5 disagreement -- you can't raise that privilege for them. But
6 these documents are in your possession and so under Rule 34,
7 you turn them over per the Court's Order. Now, that doesn't
8 inhibit them from raising objections, I guess, to that -- how
9 we work through --

10 **MR. SCOTT:** Would they need to intervene to do that?
11 I mean, I don't want to get the Court mad at us by -- once we
12 alert the hundred and eight-nine that said they want to assert.

13 **THE COURT:** But -- and that's fine. But that's why I
14 needed to finish out this process, how we'd look at this
15 privilege, because if they do, they can see how the Court's
16 probably going to respond anyway --

17 **MR. SCOTT:** Yes.

18 **THE COURT:** -- after we've done this and gone through
19 this exercise about how the Court's going to address that
20 privilege. But I don't think I could keep -- say, you're
21 someone's attorney -- someone subpoenas your records, I don't
22 think there's any reason that former client can't come and
23 object and claim that privilege, too.

24 **MR. SCOTT:** As long as the Court is open to that,
25 then that's a process --

1 **THE COURT:** Well, yeah, I don't know how it will work
2 but I wanted to go ahead and lay out the parameters of what
3 this Court's view was going to be on that privilege and how it
4 was going to be handled. But I don't think I can prohibit
5 that. Do you want to address that?

6 **MR. FREEMAN:** I do, your Honor, because the United
7 States needs to short circuit any further delay that Mr. Scott
8 is plotting here. These documents were produced in response to
9 a request for production --

10 **THE COURT:** Stop plotting. (Laughing)

11 **MR. FREEMAN:** -- served on the State of Texas. And
12 Mr. Scott, I believe, is contemplating that after this Court
13 orders that these documents be produced that they withhold them
14 because --

15 **THE COURT:** You know --

16 **MR. FREEMAN:** -- the individual legislators --

17 **THE COURT:** Yeah.

18 **MR. FREEMAN:** -- might claim that there is an
19 attorney-client privilege --

20 **THE COURT:** He's been ordered --

21 **MR. FREEMAN:** -- that attached when they turned them
22 over.

23 **THE COURT:** -- to turn them over.

24 **MR. FREEMAN:** Okay.

25 **THE COURT:** This Court cannot prohibit whoever owns

1 those documents from filing objections. I think that would be
2 improper.

3 **MR. FREEMAN:** I understand, your Honor.

4 **THE COURT:** But I will --

5 **MR. FREEMAN:** And all I'm saying is that the Office
6 of the Attorney General has also asserted that it represents
7 numerous individual legislators in their individual capacity,
8 and I think that this issue is --

9 **THE COURT:** It's --

10 **MR. FREEMAN:** -- ripe to be resolved now.

11 **THE COURT:** I think we have flushed out enough with
12 the Court's view and how the Court wants to proceed with this
13 issue, but if there is some objections filed, it could be a
14 quick phone call with everyone, a quick phone conference, so --

15 **MR. FREEMAN:** Thank you, your Honor.

16 **THE COURT:** Okay. But the issue still remains that
17 the defendants are claiming an attorney-client privilege. I
18 have not looked at the logs. You all have a lot of documents
19 out there. I don't know what's been established, what hasn't.
20 I've already -- I've ruled that the attorney-client privilege
21 does not cover all the documents just because they were turned
22 over from the client. So, that being said, what are we looking
23 at?

24 **MR. FREEMAN:** Your Honor, there are approximately
25 3,900 pages of privilege logs, I believe.

1 **THE COURT:** But what covers the attorney-client
2 privilege now that I've gotten rid of the global privilege?

3 **MR. FREEMAN:** There's -- there's a limited set. And
4 what the United States would ask this Court to do is rule
5 categorically with regard to certain types of assertions, which
6 are pretty simply resolved, which are -- and I -- it may be in
7 our proposed order, as well, and those privilege logs
8 themselves were exhibits to our initial motion. We're simply
9 asking this Court to say that there is a waiver of the
10 attorney-client privilege where there was a communication
11 between different legislative offices --

12 **THE COURT:** Well, do you think that's privileged?

13 **MR. FREEMAN:** They certainly asserted it --

14 **THE COURT:** Wait, wait.

15 **MR. FREEMAN:** -- in their privilege log.

16 **MR. SCOTT:** I'm sorry, your Honor.

17 **THE COURT:** Communications between different
18 legislators? How is that attorney-client privilege?

19 **MR. SCOTT:** I don't know the specific document.

20 **THE COURT:** Okay.

21 **MR. SCOTT:** And speaking in generalities, I --

22 **THE COURT:** Do you all need to talk --

23 **MR. SCOTT:** -- I really would love to see the -- the
24 entry and perhaps --

25 **THE COURT:** Maybe you all need to confer further on

1 this attorney-client privilege now that you've got some -- some
2 rulings from the Court that everything is not privileged.

3 **MR. SPEAKER:** One document --

4 **THE COURT:** Because I do think -- I mean, it's the
5 burden of the defendant to establish the elements.

6 **MR. SCOTT:** Absolutely. (indiscernible)

7 **THE COURT:** And if there is a question --

8 **MR. SCOTT:** -- the responding party. I don't
9 disagree at all, your Honor.

10 **MR. FREEMAN:** So, for example, your Honor, on page
11 154 of the revised privilege log, I believe defendants asserted
12 the attorney-client privilege over a communication between
13 counsel for the lieutenant governor and counsel for the
14 speaker. There are similar withheld communications between the
15 chief of staff to Senator Fraser and the chief of staff
16 between -- of Representative Harless, both of whom are
17 attorneys. There's -- and those types of communications where
18 they're between different offices, and I believe they're listed
19 out in our --

20 **THE COURT:** Okay.

21 **MR. FREEMAN:** -- in our proposed order -- that's what
22 we're talking about.

23 **MR. SCOTT:** And happy to visit with them about --

24 **THE COURT:** Okay.

25 **MR. SCOTT:** -- the documents --

1 **THE COURT:** Maybe that's what --

2 **MR. SCOTT:** -- now that we've got some guidance from
3 the Court.

4 **MR. FREEMAN:** Okay.

5 **THE COURT:** -- you all need to do now --

6 **MR. SCOTT:** Yes, your Honor.

7 **THE COURT:** -- being where we are --

8 **MR. FREEMAN:** Thank you.

9 **THE COURT:** -- is visit further on the attorney-
10 client --

11 **MR. SCOTT:** Okay.

12 **THE COURT:** -- privilege issue.

13 **MR. DUNN:** Two points on the visiting further. It
14 would be helpful if the Court could go ahead and set the
15 telephone conference --

16 **THE COURT:** Well, tell me what you all can do on the
17 attorney-client privilege. When are you all going to get
18 together and --

19 **MR. SCOTT:** Our depos got canceled for tomorrow. I'm
20 wide open. I'll be back in Austin --

21 **THE COURT:** Tomorrow, then.

22 **MR. FREEMAN:** How about after lunch?

23 **MR. SCOTT:** Yeah. Today?

24 **THE COURT:** Today and --

25 **MR. FREEMAN:** I mean, we have a 2:30 flight, but --

1 **THE COURT:** Today and tomorrow.

2 **MR. FREEMAN:** If we have -- if we have time, or if we
3 change it --

4 **MR. SCOTT:** Well, there's 30 some -- if there's 3,000
5 pages -- and I apologize; I don't know what the total number
6 is. I don't know the --

7 **THE COURT:** Why don't you all each --

8 **MR. SCOTT:** Okay.

9 **THE COURT:** -- individually look at it today, confer
10 tomorrow. If you all were going to be in depos anyway, hash it
11 out all day tomorrow, whatever you need to do. I am pretty
12 tied up on Friday, I think, Brandy --

13 **THE CLERK:** Yes, your Honor.

14 **THE COURT:** -- so, you know, it would -- we can do a
15 phone conference early next week if we have to.

16 **MR. SPEAKER:** Okay.

17 **MR. FREEMAN:** Your Honor, the United States would
18 request that there be some date certain set when the defendants
19 will produce those documents --

20 **THE COURT:** Okay.

21 **MR. FREEMAN:** -- where the only privilege asserted
22 was the state legislator privilege.

23 **THE COURT:** Well, you already have them, so it
24 shouldn't be a problem. Within what?

25 **MR. FREEMAN:** Could we get seven days, your Honor?

1 **THE COURT:** Seven days?

2 **MR. SCOTT:** There is a -- my understanding is the
3 documents that we have in our custody -- and let me get
4 Mr. Whitley to come address this. There is a -- talk about an
5 April Fool's joke; I'm not kidding. There is a -- there is an
6 ESI agreement we had in this case to produce with certain
7 fields. I do not believe all of the materials in our
8 possession, and I think a lot of them, don't have all of the
9 fields that are required under the ESI. And I bring that up
10 simply because they are documents that were gathered in a prior
11 litigation with no idea about the current ESI agreement, but is
12 that --

13 **MR. WHITLEY:** I don't remember the contours of any
14 ESI agreement in *Texas v Holder*.

15 **MR. FREEMAN:** It was nearly identical, I believe,
16 your Honor.

17 **MR. WHITLEY:** Okay.

18 **MR. FREEMAN:** And, your Honor, we served our Rule 34
19 requests --

20 **THE COURT:** Within seven days?

21 **MR. FREEMAN:** -- I believe in November or December.

22 **THE COURT:** Within seven days?

23 **(Voices and whispers off the record)**

24 **MR. SCOTT:** If -- if there is going to be a problem
25 complying with that, is it okay if we notify the Court by the

1 end of close of business tomorrow?

2 **THE COURT:** That's fine.

3 **MR. SCOTT:** Okay.

4 **THE COURT:** Now, let's go ahead and set that hearing
5 for early next week, if we need it, on the attorney-client
6 privilege. And we can do this by phone. I mean, you can
7 certainly appear if you want to.

8 **(The Court conferred with the Clerk)**

9 How about 8:30 on Tuesday morning? I won't have --
10 if I'm in trial I'm not going to have a lot of time for you
11 all, but we'll at least figure out if there is an issue. Maybe
12 we can move it along.

13 **MR. DUNN:** Eight thirty-Tuesday morning?

14 **THE COURT:** Eight thirty Tuesday morning? Okay?

15 **MR. FREEMAN:** That's fine, your Honor. Thank you.

16 **THE COURT:** And what else? I thought there was a --
17 I know we've got a couple other motions to address, but
18 anything else on this motion to compel regarding the
19 legislative privilege, those documents?

20 **MR. DUNN:** Well, you had asked before the end of the
21 hearing for us to take a look at the protective order.

22 **THE COURT:** Uh-huh.

23 **MR. DUNN:** And, so, my co-counsel, Mr. Hebert, sent
24 it to me. Paragraph 2.1 includes attorneys of record, their
25 associates, staff, and assistants working on the litigation,

1 experts, expert staff, and the Court. And that's it.

2 **THE COURT:** Okay. Did you get that?

3 **MR. SCOTT:** I hear it.

4 **THE COURT:** Okay. All right. Then, there is a
5 motion for protective order that was filed by the Government?
6 Did you all have a chance to -- what's really left? The
7 defendant has narrowed the scope, just as the state legislators
8 we've decided are not parties; neither is congress. I saw the
9 briefs submitted. I'd already, you know, thought that way
10 before that in any way -- in any matter, so what is left here?
11 The DOJ has agreed to provide what's in its files, or no?

12 **MR. SHAPIRO:** Yes, your Honor. This is Albert
13 Shapiro for --

14 **THE COURT:** And this is D-180, I believe. Okay. Go
15 ahead.

16 **MR. SHAPIRO:** Yes, your Honor. Albert Shapiro for
17 the United States.

18 The United States has indeed narrowed -- has worked
19 with defendants to narrow the scope of the requests, and now we
20 have, you know, identified entities within DOJ where they're
21 going to be directing their requests. But there is one
22 outstanding issue that remains that needs to be addressed by
23 the Court, and that is the defendant's insistence on directing
24 requests at 22 named members of congress.

25 **THE COURT:** But I think I said they have to go

1 through Rule 45 if we're going to apply the same rules.

2 **MR. CLAY:** That's what I understood you had said
3 earlier.

4 **THE COURT:** Correct?

5 **MR. SHAPIRO:** So, if we have sorted that issue, and
6 we can have a protective order on that issue, or we're in
7 agreement on that issue, we are -- we are set. I think --

8 **MR. CLAY:** We have agreed to withdraw our request as
9 it pertains -- as it's directed at the individual members of
10 congress.

11 **THE COURT:** Okay. So, is there anything left?

12 **MR. SHAPIRO:** That should be all, your Honor.

13 **THE COURT:** From the defense?

14 **MR. CLAY:** No.

15 **THE COURT:** Then, we have an agreement on the
16 protective order, correct, and the Court can terminate it?

17 **MR. CLAY:** Well, I thought if we withdraw our
18 request, then there is no pending motion for a protective
19 order. Is that --

20 **THE COURT:** Well, okay. I don't know. Is there
21 anything else left that you all may have agreed to? I'm just
22 going to terminate the motion, then.

23 **MR. SHAPIRO:** Your Honor, there should be nothing
24 else left at that point.

25 **THE COURT:** Okay.

1 **MR. SHAPIRO:** Thank you, your Honor.

2 **THE COURT:** Then, that's terminated.

3 Then we have -- we have the motions to dismiss
4 pending, and I have -- we have been working on those, so
5 hopefully in a couple of weeks I'll have some sort of ruling on
6 those, but we also had a motion to amend the scheduling order,
7 DE-196. And let me just say, I don't mind working with you all
8 on the deadlines. What stood out regarding this is you all are
9 squeezing the Court out on the dispositive motions and the
10 *Daubert* challenges; even if this were the only case I was
11 working on, there is no way I would get to that. This is a
12 bench trial. Maybe we can carry some of that stuff through the
13 trial; I don't know. But that's what -- self-interest here;
14 I'm not looking at your interest regarding that issue.

15 **MR. DELLHEIM:** We understand. Good morning, your
16 Honor. Richard Dellheim for the United States. We appreciate
17 the Court's patience this morning. We very much appreciate the
18 chance to address the Court today.

19 I think, as is apparent from what we've heard
20 heretofore, your Honor, this case is at a critical juncture.
21 And while time has always been of the essence in this case, it
22 is particularly so now. What we have understood from our prior
23 discussions with the Court is that the Court did not intend to
24 move the September 2nd trial date. And we understand that
25 decision and we respect that decision. We also understood that

1 there may be some willingness to adjust some of the interim
2 deadlines to ensure that discovery proceeded and that the
3 record be fully developed in time for trial. But as we have
4 heard today and as the Court is well aware, there have been a
5 series of delays impeding access to information the U.S.
6 considers vital to its case.

7 **THE COURT:** Okay. But I'm not really interested in
8 argument here, you all fighting with each other the way you all
9 did in your briefing, throwing jabs at each other. I'm really
10 just trying: What can we do to address the concerns regarding
11 our time frame?

12 **MR. DELLHEIM:** Well --

13 **THE COURT:** And I'm not saying that you were going
14 there. I just kind of wanted to cut that off before anybody
15 was going there.

16 **MR. DELLHEIM:** I very much --

17 **THE COURT:** About jabs: your fault; your fault; no,
18 you're dragging your feet; no, you were. We are where we are.

19 **MR. DELLHEIM:** And where we are is a process that has
20 been impeded by some significant delay.

21 The proposed modification that we have before the
22 Court, in light of that delay, serves two critical purposes.
23 First, it preserves September trial date; that we think is
24 paramount. But almost equally as important, it is necessary to
25 ensure that the record before the Court at trial is as complete

1 and meaningful and probative as possible.

2 There are two aspects to the remainder of discovery:
3 the elaborate -- number one, of course, is the elaborate,
4 highly-structured data matching that is currently under way
5 across five federal agencies. I will address that in a moment.
6 The second, of course, is the fact discovery, particularly the
7 legislative discovery, which was addressed previously this
8 morning, and we are very appreciative of the Court's guidance
9 on those issues.

10 I'd like to address the data matching evidence, if I
11 can, for a moment, your Honor. That evidence is absolutely
12 critical to our case. The ability of the United States to
13 present a *prima facie* case on the effect of SB 14 depends on
14 that analysis. And far from foot dragging, the United States
15 has worked feverishly to complete that enormously complicated
16 project as fast as possible. And it is enormously complicated.
17 We are working with five federal agencies and working with
18 literally hundreds of millions of records. And by agreement of
19 the parties, we are working on behalf of all of the parties.

20 And I'd like to be clear about something. The delays
21 in starting that process were not the fault of the United
22 States. We sought those data in November. And after a --
23 the -- the -- when I say "those data," I mean the defendant's
24 voter files. And after a series of delays and objections, the
25 defendants produced those crucial data nearly three months

1 later on February 19th, and then only in response to this
2 Court's order. That significant delay in obtaining those
3 crucial data resulted in a commensurate delay in the beginning
4 of our ability to analyze those data.

5 And, your Honor, based on our daily conversations
6 with the five federal agencies, and due to the enormity and the
7 novelty of the task involved, there is at this point a
8 technological limit to the agencies' ability to finish their
9 work according to the current schedule. Based on all we know,
10 we believe it is now impossible for the agencies to complete
11 their work under the current schedule. And, moreover, we also
12 need to be mindful that the agencies are simultaneously
13 devoting their limited resources to trying to accomplish their
14 mission critical work as well. The data matching simply cannot
15 be done under the current schedule, and that is why we have
16 asked for what we believe are reasonable adjustments to that
17 schedule.

18 Again, what the United States is doing is
19 unprecedeted in its scope and by the fact that the United
20 States is doing its work on behalf of all of the parties. It's
21 critical we have the time that we need to do the work and do it
22 right. And the kind of data matching that we're talking about,
23 of course, is the exact procedure that the court in D.C.
24 indicated was appropriate for this kind of case. And we're
25 doing it. But it will take some time; and the months we have

1 lost in receiving the voter data from Texas, that time lost,
2 despite our best efforts, is simply impossible for us to make
3 up fully. But that's, of course, just part of it.

4 Once the agencies have completed their work and
5 generated the outputs, we will need some time to analyze those
6 data and produce reports. Under our proposed schedule we would
7 propose that the plaintiffs have four weeks from May 30th, when
8 the data will be available, to analyze those data and produce
9 expert reports. We would propose that the defendants have a
10 full seven weeks from the day those data are produced to
11 analyze those data and produce their reports. We would also
12 ask for a minimum amount of time to reply. Your Honor, the
13 time is critically necessary to ensure that the effects
14 evidence presented to the Court is as meaningful and as
15 complete and reliable as possible, and our ability to present
16 such a case hinges on having the time to do the work required.

17 The other aspect, of course, of what remains before
18 us is the fact discovery. And, again, I don't want to belabor
19 what came this -- what came before, and I won't go there. I
20 will just simply say that we are appreciative of the Court's
21 efforts to keep this moving. We anticipate -- I mean, there
22 has been a significant amount of motion practice heretofore.
23 We anticipate there may be even more motion practice to come.
24 We would anticipate there may be objections lodged at
25 depositions that will need to be presented to the Court for

1 immediate resolution or the deposes will not be able to continue
2 effectively.

3 So, what I'm saying, your Honor, is that we will be
4 very much reliant upon the Court to help keep this process
5 moving. The United States is doing everything it can to keep
6 things moving and to prepare a full case for this Court's
7 consideration by September 2nd.

8 And you have been very patient. I will conclude with
9 this. Having only just been given access to the State's
10 databases, we believe the interests of justice dictate that the
11 United States have adequate time to analyze those data. It's
12 crucial. It's necessary. And the U.S. must also be permitted
13 reasonable and timely access to all of the other evidence for
14 its case, access that has been resisted to this point. We
15 respectfully request that the Court grant the motion to modify
16 the scheduling order in this profoundly important case.

17 **THE COURT:** All right. Who's arguing? Oh.

18 **MR. ROSENBERG:** Can I just add one thing in response
19 to what your Honor raised in terms of the crunch on your
20 Honor's time, which I hate to say you ain't seen nothing yet,
21 but --

22 **THE COURT:** Yeah. And -- yeah.

23 **MR. ROSENBERG:** -- you ain't seen nothing yet. Your
24 Honor is right. This is going to be a bench trial. I think
25 that the parties should be able to work out a procedure at the

1 tail end that perhaps either just reserves rights on Daubert,
2 for example; they can be dealt with at trial; reserves rights
3 in the limine motions, perhaps even on dispositive motions.
4 There are ways for us to do it. We fully support DOJ's
5 schedule in terms of the extension of fact discovery and the
6 extension of -- and the change in expert discovery. On the
7 tail end, I think the parties should be able to sit down and
8 work out something that works for the Court, because there's
9 going to be a lot of paper during that period of time; it is a
10 bench trial; there is no need for that full briefing to occur
11 prior to the trial if the parties can reserve their rights to
12 proceed.

13 **THE COURT:** Okay.

14 **MR. RIOS:** Your Honor, Rolando Rios on behalf of the
15 Hispanic Judges and Commissioners; just make some brief
16 comments, your Honor, in strong support of the Government's --
17 United States' scheduling order.

18 In '07 and '09, the -- during those legislative
19 sessions, your Honor, the blocking bill was -- I mean the SB 14
20 was stopped by the blocking bill, which allowed one third of
21 the legislators to block any bill from getting on the floor of
22 the senate. And they were successful in '07 and '09, and then
23 in '10 the census came out and indicated that the Hispanic
24 voting age population increased dramatically. So, in the '11,
25 the '11 session, the Governor declared a emergency, a State

1 emergency, and vitiated the blocking bill requiring a simple
2 majority to get that bill through. And then in '12, the
3 Section 5 stopped that bill, and the three-judge court ruled
4 that the law violated the Voting Rights Act. And then the
5 Supreme Court knocked down the Section 5 Voting Rights Act.
6 And in '13 the legislature, even though we had the three-judge
7 court ruling, we had the blocking bill, it was vitiated again,
8 and the bill passed.

9 This has been a continuing practice of obstruction as
10 far as the State of Texas is concerned, and we, as plaintiffs,
11 over here on this side, your Honor, Hispanic Judges and
12 Commissioners, are heavily, heavily dependent on the Department
13 of Justice being able to set the record so we can stop this --
14 this nonsense that's being pushed forward by the State. So, we
15 would strongly, strongly, urge the Court to consider the
16 rescheduling of the -- as is suggested by the federal
17 government, your Honor. Thank you.

18 **THE COURT:** All right.

19 **MR. SCOTT:** Your Honor, I heard you say we weren't
20 supposed to place blame, although I heard a lot.

21 **THE COURT:** I read about all of the blame, so --

22 **MR. SCOTT:** Yeah. And --

23 **THE COURT:** -- I don't need to hear it. I just -- I
24 think we need to adjust some things here.

25 **MR. SCOTT:** And, your Honor, one of the big

1 difficulties I've pointed out to the other side, or attempted
2 to, was that every one of the issues that they bring up, the
3 result is to place the burden upon the defendants, by
4 compressing their time and reducing their time to respond to
5 experts that the plaintiffs will have an extended time to
6 produce reports with, and upon the Court. And I fully
7 anticipate there will be constitutional challenges that the
8 Court will face on Section 2 in the way that these plaintiffs
9 are attempting to assert it. I fully anticipate there is going
10 to be a whole host of motions to Mr. Rosenberg's point. I
11 don't know that we've seen anything yet.

12 But at the end of the day, just to look at one issue
13 that they've raised in their proposed -- they've proposed that
14 the defendant's expert goes from 28 days to now we have 21
15 days, but they leave out the point that July 4th is one of
16 those weeks that they've been kind enough to give us during
17 that 21 days. So, again, they conveniently leave out different
18 issues about their proposed schedule, all of which have nothing
19 to do with fact discovery needing an extended period of time.
20 The fact discovery issues seem like they've gone away based
21 upon what this Court has ordered today. When we look back at
22 the DOJ's motions, they were exclusively dealing with issues of
23 needing more time because they need the ability to go subpoena
24 legislators. That's -- that issue goes away to get those
25 documents because the Court has ordered the State of Texas to

1 turn those documents over to them.

2 So, the idea that we need another 50 some-odd days of
3 discovery for a case that was filed in June of 2013 and the
4 result of that extension of time is to compress and divest the
5 State of Texas of the ability to defend itself in this case, on
6 a perfectly proper statute that has been picture perfect when
7 applied in -- at the polls, is -- defies any kind of reason.

8 **THE COURT:** What about the database comparison issue
9 though? Isn't that going to get into --

10 **MR. SCOTT:** The data --

11 **THE COURT:** -- discovery --

12 **MR. SCOTT:** Well --

13 **THE COURT:** -- I mean isn't that going to --

14 **MR. SCOTT:** -- the database issue is something that
15 seems to be related solely to expert testimony. The database
16 results are going to be supplied to the parties' experts. The
17 parties' experts are going to be the only one that need that.
18 That has -- and that goes to my point about the extension of
19 fact discovery. There is no reason to extend fact discovery

20 **THE COURT:** Okay. Why are we trying to extend fact
21 discovery, then? I thought that was the problem; the database
22 comparison's not ready till May 30th, so we're giving some 30
23 days after that.

24 **MR. DELLHEIM:** Your Honor, we -- we began the -- the
25 discovery process seeking to obtain information, vital

1 information, relevant information, to the -- to the intent
2 claims, as well as the effects claims, beginning in last --
3 last November. It wasn't until today that the State of Texas
4 has been ordered to provide us the information that we have
5 desperately sought for months and months and months. The delay
6 is not the result or the fault of the United States. The
7 discovery process is complex. These cases are intricate and
8 difficult and complex. Depositions have not even begun to
9 be -- have not even begun yet.

10 **THE COURT:** But why? Why haven't they started?

11 **MR. DELLHEIM:** It did not make sense to subpoena
12 legislators when we did not have any documents. Until the
13 issues that have been pending with the Court were resolved, it
14 did not make sense.

15 **THE COURT:** Okay.

16 **MR. DELLHEIM:** And that -- as the State of Texas
17 suggests, and as I attempted to foreshadow before, we believe
18 there is going to be continuing motion practice that will delay
19 this case. We urge the Court, and we are reliant upon the
20 Court, to help us get access to the information vital to our
21 intent claim and our effects claim.

22 **MR. SCOTT:** Your Honor, briefly, November 22nd, 2013,
23 letter to DOJ from my office -- or from me:

24 "In particular, your letter seeks to impose a
25 preservation obligation on Texas current and former

1 state legislators who are neither parties to this
2 litigation nor subject to our direction or control.
3 To the extent you seek discovery from nonparties,
4 including state legislators, the Federal Rules of
5 Civil Procedure govern such requests."

6 I mean, since November. Then in December we notified
7 them that our database was ready. We provided our matches from
8 our algorithm to them without even knowing what theirs was. We
9 unilaterally agreed in January, as a result of an amended
10 request for production that they had that was due in January,
11 to produce our databases unilaterally to them without trying to
12 get any of the documents -- or the databases of the federal
13 government, to avoid any potential national security issues.
14 We have bent over backwards. And, as a result of bending over
15 backwards, today we find out that we're the bad guy; and the
16 bad guy should be punished and reduced his attempt -- his
17 ability to defend themselves.

18 **THE COURT:** Okay. I -- I don't think you're the bad
19 guy. But I think where we are, if there is room for movement,
20 what we can alter or specifically where the defense feels it's
21 being crunched, you know, I will address that. I do think
22 where we are we do need some more time regarding some of these
23 matters.

24 **MR. DELLHEIM:** Your Honor, if I may, we are
25 absolutely firm on our need to have an amended schedule with

1 respect to discovery. We are happy to work cooperatively with
2 the defendants and with the other plaintiffs to see what room
3 there is on the back end to see what we can do to help relieve
4 some of the pressure that falls upon all of us.

5 **THE COURT:** Okay. Well, let me backtrack here. You
6 all were -- changed the final pretrial conference to -- from
7 August 21st to the 27th. I don't have a problem with that, but
8 the joint pretrial order needs to be filed probably a week
9 before that; which would put it at August 22nd, Brandy?

10 **THE CLERK:** A week before would be the 20th, your
11 Honor.

12 **THE COURT:** The 20th. The findings and conclusions
13 August -- they're just moving four days; I don't have a problem
14 with that, on August 18th.

15 So, I guess the question is, where does the defense
16 think it's being put in a corner regarding discovery and
17 experts; and see what can be worked out.

18 **MR. SCOTT:** We've -- well, we've been reduced from 28
19 days to 21 days --

20 **THE COURT:** On the --

21 **MR. SCOTT:** -- in the proposed order.

22 **THE COURT:** On the --

23 **MR. SCOTT:** On the proposed schedule that they
24 provided.

25 **THE COURT:** For the fact discovery, expert discovery,

1 expert reports?

2 **MR. SCOTT:** Defendant's expert reports.

3 **THE COURT:** Okay.

4 **MR. SCOTT:** They've extended their time from --

5 **THE COURT:** Okay. Then --

6 **MR. SCOTT:** -- what would have been nine days to --

7 **THE COURT:** Then, you all need to bump. Plaintiffs
8 need to bump that back to give them their 30 days.

9 **(Pause)**

10 Why don't we just bump back to June 20th on
11 discovery, fact discovery; the plaintiffs put that at June 20th
12 for your expert reports; the defendants then would be July
13 18th, which is almost your month there. I don't know; I'm
14 talking out loud; because this may bump into other problems.

15 **MR. DELLHEIM:** Your Honor, forgive me. Based on
16 what we know, the database that is going to be produced, the
17 outputs from the data matching, will be enormous -- enormous
18 and --

19 **THE COURT:** Okay. Well, you're not going to cut his
20 experts 30 days -- I mean you're not going to cut him down on
21 his expert report deadline. So, you all try to work it out.
22 You're going to give him the time he had before, the
23 defendants. So, you all figure it out from there.

24 What else?

25 **MR. SCOTT:** Yeah, I think the Court has addressed

1 earlier the concern about reducing the time the Court has for
2 the dispositive motions, the *Daubert* motions. To the extent
3 that the parties could come up with an alternate route, as
4 Mr. Rosenberg has addressed, I know the last case we were able
5 to simplify things, it was my understanding; I wasn't a
6 participant in it. but it reduced it to -- was it a week?

7 **MR. ROSENBERG:** Yeah, we did it in a week, and, as
8 I've said many times, you have to sit down, Mr. Scott, with
9 DOJ, all of us would be, and work out a protocol for the -- to
10 submit to the Court.

11 **THE COURT:** Okay. Why don't -- since you all were
12 going to -- you all are going to confer tomorrow on the
13 attorney-client privilege, why don't you all sit down and visit
14 about that also. And then when we talk on Tuesday morning we
15 can see where you all are at. Okay?

16 **MR. ROSENBERG:** We'll do that, your Honor. Thank
17 you.

18 **THE COURT:** Anything else to address on that issue,
19 then, on the scheduling order?

20 **MR. SCOTT:** Nothing from the defendant at this time,
21 your Honor.

22 **THE COURT:** Anything else left? From the plaintiffs?

23 **MR. ROSENBERG:** No, your Honor.

24 **THE COURT:** The defense? And I signed the pro hac
25 vice earlier.

1 All right. You're excused. So, at this point, then,
2 we're conferring Tuesday morning, but you all are going to
3 confer further.

4 **MR. SPEAKER:** Thank you, your Honor.

5 **MR. SCOTT:** And by telephone at 8:30.

6 **THE COURT:** That's --- uh-huh. That's fine. Thank
7 you.

8 Maybe you all can kind of lay out, also, when you all
9 visit, what motions you all anticipate being filed, what the
10 Court's going to be looking at. You know, I'm in a situation
11 where we've had a vacancy for almost three years now, so I'm
12 carrying most -- pretty much all of the civil, as well as the
13 criminal docket. And it just puts me in a crunch, too, so I --
14 I know you're working hard, but know that I am, too. So --
15 you're excused.

16 **MR. SPEAKER:** Thank you, your Honor.

17 (**Proceeding was adjourned at 12:04 p.m.**)

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

A handwritten signature in black ink, appearing to read "Toni I. Hudson".

April 2, 2014

TONI HUDSON, TRANSCRIBER